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No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF MANASSAS, VIRGINIA, *Et Al.*,

Appellants,

and

WILLIAM H. FORST,

Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does Virginia Code Ann. § 58.1-3502 (Repl. Vol. 1984) unconstitutionally discriminate against the United States and the contractors with whom It deals?

PARTIES BELOW

The appellant in the Court of Appeals for the Fourth Circuit was the United States of America. The appellees in the Court of Appeals for the Fourth Circuit were the City of Manassas, Virginia and Arthur L. Shoemake, Commissioner of Revenue of the City of Manassas. William H. Forst, State Tax Commissioner of the Commonwealth of Virginia, who intervened at the District Court level, was also an appellee in the Court of Appeals for the Fourth Circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES BELOW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

STATEMENT OF THE REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL 6

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

Cases **Page**

Chrysler Corporation v. Township of Sterling,
410 F.2d 62 (6th Cir. 1969) 8

City of Detroit v. Murray Corporation of America,
355 U.S. 489 (1958) 6

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 6

Panhandle Oil Company v. Mississippi ex rel. Knox,
277 U.S. 218 (1928) 6

Phillips Chemical Co. v. Dumas School District,
361 U.S. 376 (1960) 5,8

United States v. Boyd,
378 U.S. 39 (1964) 6

United States v. City of Detroit
355 U.S. 466 (1957) 6

United States v. Department of Revenue of the State of Illinois, 191 F. Supp. 723 (N.D. Ill. 1961), *vacated*, 368 U.S. 30 (1961), on remand, 202 F. Supp. 757 (N.D. Ill. 1962), *aff'd*, 371 U.S. 21 (1962) 8

Other Authorities

SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION 2,4,7

28 U.S.C. § 1254(2) 2,3,A-24

28 U.S.C. § 1291 ..... 2,3,A-24

28 U.S.C. § 1331 ..... 2,3,4,A-25

28 U.S.C. § 1345 ..... 2,3,4,A-25

28 U.S.C. § 2201 ..... 2,3,4,A-25

§ 58.1-3502 of the Code of Virginia i,2,3,4,5,6,7,A-26

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CITY OF MANASSAS, VIRGINIA, *Et Al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Order and Memorandum opinion of the United States District Court for the Eastern District of Virginia, dated January 30, 1986, is reported at 627 F. Supp. 645 and is reproduced in the Appellants' Appendix (App. B at A-12). The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, dated October 6, 1987, is reported at 830 F.2d 530 and is reproduced in the Appellants' Appendix. (App. A at A-1).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit held Va. Code Ann. § 58.1-3502 (Repl. Vol. 1984) repugnant to the United States Constitution in an Opinion dated October 6, 1987. The Court of Appeals' jurisdiction was assertedly based upon 28 U.S.C. § 1291. In holding Section 3502 to be unconstitutional, the Court of Appeals vacated the January 30, 1986 Order of the United States District Court for the Eastern District of Virginia, Alexandria Division, upholding the constitutionality of Section 3502. The jurisdiction of the District Court was assertedly based upon 28 U.S.C. §§ 1331, 1345 and 2201.

Appellants filed the appropriate Notice of Appeal with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit on December 23, 1987. A Copy of said Notice is reproduced in Appellants' Appendix. (App. C at A-22).

The appellate jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(2), which provides for the direct appeal to this Court from a decision of a federal court of appeals holding a state's statute to be unconstitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Court of Appeals for the Fourth Circuit, in its October 6, 1987 Opinion and Judgment, held Va. Code Ann. § 58.1-3502 to be repugnant to the Supremacy Clause of the United States Constitution. Article VI of the Constitution of the United States provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The relevant federal statutes are 28 U.S.C. §§ 1254(2), 1291, 1331, 1345 and 2201. These statutes are reproduced in the Appellants' Appendix (App. D at A-24, and A-25 respectively).

The relevant Virginia statute is Va. Code. Ann. § 58.1-3502, (formerly Va. Code Ann. § 58-831.2). This statute is reproduced in Appellants' Appendix. (App E at A-26).

STATEMENT OF THE CASE

Section 58.1-3502 of the Code of Virginia provides:

> Any person, firm, association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows, or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the same manner, and on the same basis as if the lessee was the owner thereof. This Section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (Section 15.1-1342 *et seq.*) and leased to provide transportation services.

The City of Manassas collected a tax from International Business Machine Corporation (IBM) for the tax years 1981, 1982, 1983, and 1984 pursuant to the provisions of

Section 58.1-3502 (formerly Section 58-831.2). IBM paid said tax under protest for the above-enumerated tax years. Pursuant to various cost-plus fee contracts entered into between IBM and the Defense Logistics Agency (Department of Defense), IBM was reimbursed by the United States for the entire amount of money remitted to the City of Manassas pursuant to Section 58.1-3502 (formerly Section 58-831.2).

The United States of America filed its Complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division, on June 24, 1985, seeking a declaratory judgment that Section 58.1-3502 (formerly Section 58-831.2) was repugnant to the Supremacy Clause of the United States Constitution. The United States also sought temporary and permanent injunctive relief from the utilization of Section 3502. Finally, the United States sought a refund of all moneys remitted to the City of Manassas pursuant to Section 58.1-3502 (formerly Section 58-831.2). Named as defendants in the suit were the City of Manassas, Virginia and Arthur L. Shoemake, Commissioner of Revenue for the City of Manassas. The suit was brought under 28 U.S.C. §§ 1331, 1345 and 2201. The United States asked the District Court for a declaratory Judgment that Va. Code Ann. § 58.1-3502 (formerly Va. Code Ann. § 58.831.2) was unconstitutional; the United States sought preliminary and permanent injunctive relief prohibiting the City of Manassas and Arthur L. Shoemake, their employees, agents, attorneys, successors in office and all those acting in concert with them who shall receive notice of the injunction sought from imposing, assessing or collecting any tax pursuant to Section 3502 on property furnished by the United States to its contractors. Finally, the United States sought a refund, with interest, of all local personal property taxes that were paid to the City of Manassas by IBM for the tax years 1981 through 1984. The question sought to be reviewed on this appeal was first

raised at the District Court level in plaintiff's Complaint. The question was ultimately passed upon by the District Court in its January 30, 1986 Opinion granting appellant's Motion for Summary Judgment.

On August 14, 1985, William H. Forst, State Tax Commissioner for the Commonwealth of Virginia, filed his Motion to Intervene. (App. F at A-27). By Order dated September 23, 1985, the United States District Court for the Eastern District of Virginia, Alexandria Division, granted Mr. Forst's Motion to Intervene. (App. G at A-33). The District Court rendered its Judgment and Opinion on January 30, 1986, finding that although Section 3502 was seemingly discriminatory on its face, the Section would not be unconstitutional if the discrimination was justified. In considering the exemptions found for individuals leasing property from the Virginia Port Authority and Virginia Transportation Districts in the provisions Va. Code Ann. § 58.1-3502, the Court held that said exemptions were justified on public policy grounds. The Court thus granted appellants' Motion for Summary Judgment.

The United States of America filed its Notice of Appeal in the United States District Court for the Eastern District of Virginia, Alexandria Division to the January 30, 1986 Order of said Court, on March 28, 1986. (App. H at 35).

The question sought to be reviewed in this Appeal was raised in Appellee's Statement of Issues Presented for Review submitted to the Fourth Circuit on June 12, 1986. After briefing and oral argument, a panel of the Court of Appeals rendered its Opinion on October 6, 1987, vacating the District Court's Order, stating that the exemptions found in the provisions of § 58.1-3502 were not justified within the meaning of *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). Thus, the Fourth Circuit ruled upon the question which appellants' seek to review in its October 6, 1987 Opinion.

The appellants herein filed their Notice of Appeal in the United States Court of Appeals for the Fourth Circuit from the October 6, 1987 Order of said Court on December 23, 1987 (App. C at A-22). Neither the District Court nor the Court of Appeals certified to the Attorney General of Virginia, pursuant to 28 U.S.C. § 2403(b), the fact that the constitutionality of Va. Code Ann. § 58.1-3502 was drawn into question.

STATEMENT OF REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that any state tax on the instrumentalities of the United States is invalid. Well into the twentieth century, the *McCulloch* rationale was used by this Court to invalidate any state tax which may have had the effect of increasing the costs to the federal government of performing its functions. *See, e.g., Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928)

It is, however, now axiomatic that the government's constitutional immunity from state taxation does not inure to the benefit of private parties with whom the government deals merely because all or part of the financial burden of the tax eventually falls on the government. *United States v. City of Detroit*, 355 U.S. 466 (1957).

Specifically, this Court has upheld state taxing schemes which reach a federal government contractor's interest in government provided property used by the contractor to perform cost-plus fee contracts entered into with the United States. "The use by the contractor (of government-provided property) for his own private ends--in connection with commercial activities carried on for profit--is a separate and distinct taxable activity." *United States v. Boyd*, 378 U.S. 39 (1964). *See also City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958).

In response to the trend found in this Court's opinions during the last four decades upholding the power of the states to tax a contractor's interest in tangible personal property provided to it by the United States government, the General Assembly of Virginia enacted § 58.1-3502 (formerly § 58-831.2) of the Code of Virginia. Section 3502 taxes the interest of a contractor engaged in business for profit which leases, borrows, or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local government in such leased or borrowed property.

Although the taxing scheme set forth in § 58.1-3502 was challenged below on grounds that it was in fact a direct tax on the United States, it is clear that the courts below did not consider such argument in determining the constitutionality of the taxing provision. Instead, the courts below have focused on two exceptions to the provisions of § 58.1-3502 contained in the statute in determining its constitutionality. Section 3502 provides exemptions from its provisions for contractors with respect to property owned by the Virginia Port Authority and leased in connection with piers and marine terminals and related facilities. Section 3502 also provides an exemption from its provisions for contractors with respect to property owned by any transportation district organized under the Transportation District Act of 1964 and leased to provide transportation services.

The question thus becomes whether the exemptions from the provisions of the tax set forth in Va. Code Ann. §58.1-3502 (formerly Va. Code Ann. § 58-831.2) on machinery and tools used in manufacturing furnished to IBM by the United States for the performance of certain contracts entered into between IBM and the Department of Defense render the statute as a whole repugnant to the Supremacy Clause of the United States Constitution.

The question of whether exemptions to the provisions of state taxing statutes benefiting those who contract with certain state entities offend the United States Constitution has been tangentially studied by this Court. In *United States v. Department of Revenue of the State of Illinois,* 191 F. Supp. 723 (N.D. Ill. 1961), *vacated*, 368 U.S. 30 (1961), on remand, 202 F. Supp. 757 (N.D. Ill. 1962), *aff'd*, 371 U.S. 21 (1962), this Court approved a taxing scheme which exempted from a retailer's occupation tax certain non-governmental units such as charities, schools and churches based upon the public good nature of the exemption.

The Sixth Circuit Court of Appeals in *Chrysler Corporation v. Township of Sterling*, 410 F.2d 62 (6th Cir. 1969), approved a Michigan taxing scheme which created an exemption in favor of state supported educational institutions on the grounds that the exemption was conducive to the welfare of the general public. The Sixth Circuit based its opinion in *Chrysler* on the language implemented by this Court in its opinion in *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). In *Phillips*, two Texas taxing statutes, taken in combination, subjected lessees of federally owned lands to a more onerous use tax than all similarly situated lessees of state-owned property. Before ruling on the constitutionality of the taxes, this Court stated, in the *Phillips* opinion, that "[t]he discrimination against the United States and its lessees seems apparant. The question, however, is whether it can be justified." *Id.* at 382.

The Fourth Circuit Court of Appeals struck down Section 3502 as violative of the United States Constitution, finding that this Court's Opinion in *Phillips Chemical Co. v. Dumas School District,* 361 U.S. 376 (1960) did not sanction an analysis of the justification of a discriminatory tax. The Fourth Circuit refused to follow the majority in *Chrysler Corporation v. Township of Sterling*, in essence, holding that a tax which treats some state contractors differently than federal contractors can never be justified on any grounds.

CONCLUSION

The federal question presented here is clearly one of substantial importance: it involves the invalidation of a duly enacted state statute by a federal court of appeals—an act of great importance which has substantial potential consequences. Furthermore, the Fourth Circuit's Opinion in the matter below has created a clear conflict between the Fourth Circuit and the Sixth Circuit as to the ability of a state to justify a discriminatory tax on public policy grounds. This substantial and important issue is worthy of this Court's full consideration.

Respectfully submitted,

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January 4, 1988

PROOF OF SERVICE

I hereby certify that this Jurisdictional Statement was mailed, postage prepaid, pursuant to Rule 12 of the Rules of the United States Supreme Court this 4th day of January, 1988 to the Honorable Charles Fried, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and the Honorable Edwin R. Meese, c/o Michael L. Paup, Esq. and Richard A. Correa, Esq., Attorneys, Tax Division, Department of Justice, P.O. Box 502, Washington, D.C. 20044. All parties required to be served have been served. (Rule 28.5 of the Rules of the Supreme Court of the United States).

James W. Hopper

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 86-2544

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CITY OF MANASSAS, VIRGINIA;
ARTHUR L. SHOEMAKE, Commissioner
of Revenue for the City of Manassas;
William H. Forst, State Tax Commissioner
of the Commonwealth of Virginia,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge (C/A A-85-731-A)

Argued December 10, 1986 Decided October 6, 1987

Before WIDENER and ERVIN, Circuit Judges, and HENDERSON, United States District Judge for the District of South Carolina, sitting by designation.

John Joseph McCarthy, Tax Division, Department of Justice (Roger M. Olsen, Assistant Attorney General; Michael L. Paup, Jonathen S. Cohen; Richard A. Correa; Henry E. Hudson, United States Attorney, on Brief) for Appellant; James Walter Hopper (Gardner, Moss & Hopper; Mary Sue Terry, Attorney General; Kenneth W Thorson, Senior Assistant Attorney General; Marion S. Cooper, Assistant Attorney General, on brief) for appellees.

WIDENER, Circuit Judge:

The United States appeals from the Judgment of the district court upholding the constitutionality of § 58.1-3502 of the Virginia Code, which subjects users of federally owned property to taxation by local governments. Because we feel that the Commonwealth's taxing scheme unjustifiably discriminates against the United States and those with whom it deals, we vacate the judgment of the district court and remand for action not inconsistent with this opinion.

Since 1981, the United States Defense Logistics Agency has supervised numerous contracts performed by International Business Machines Corporation (IBM) for the Defense Department at IBM's facility in Manassas, Virginia. The Bulk of these contracts involve services performed for the Department of the Navy in research and development, design, assembly and testing of signal processing and submarine sonar systems. Under these contracts, the United States provides government property, including machinery and tools, to IBM for use in performing these services, and the contracts provide that IBM may use United States property only in performance of these contracts, and not in performance of non-federal contracts or for its own account. The United States pays IBM a fee for these services which constitutes IBM's profit, and the United States pays all expenses incurred in IBM's performance, including the taxes at issue here.

On June 23, 1981, the City of Manassas informed IBM that under Va. Code § 58-831.2 (recodified as § 58.1-3502), it was subject to taxation with respect to the property furnished to it by the federal government. This section reads:

> § 58.1-3502. Tangible personal property leased, loaned, or otherwise made available to a private party from agency of federal, state or local government. -- Any person, firm, association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (§ 15.1-1342 et seq.) and leased to provide transportation services.

IBM paid, under protest, personal property taxes under this section totalling $290,364 for the years 1981-84, and was thereafter reimbursed by the United States.

The United States subsequently filed suit in United States District Court for the Eastern District of Virginia, claiming that the tax was unconstitutional and seeking a refund of taxes collected and injunctive relief. From a judgment for the defendant, the government appeals.

On appeal, the United States raises two issues: (1) whether the Virginia tax is unconstitutional because it imposes a greater burden on federal contractors than on those contracting with the Virginia Port Authority or local transportation districts, and (2) whether the statute unconstitutionally taxes the property of the United States

by taxing the full value of the property used, rather than the contractor's possessory interest in that property. Because we find that the exemptions for certain state instrumentalities render the tax invalid as applied to IBM, we do not address the question of how such a tax might properly be computed were it applied non-discriminatorily.

Ever since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the federal courts have looked very closely at the burdens that state taxation schemes place on the federal government. In that case, the Supreme Court struck down a Maryland tax on notes of the Bank of the United States as a violation of the Supremacy Clause.[1] Although there has been much water over the dam since the day when the Court proclaimed that "the power to tax involves the power to destroy," it remains axiomatic that a state or local tax may not discriminate against the United States or those with whom it deals. See, e.g. *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961).

There are limits to the doctrine of federal tax immunity, however. While no direct tax can be levied on the United States, immunity will not be conferred merely because a state tax ultimately burdens the United States, even if the United States shoulders the entire economic burden of the tax. *Alabama v. King & Boozer*, 314 U.S. 1 (1941). Likewise, there is no immunity simply because the state tax is assessed on contractors providing services to the government. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). "And where a use tax is involved, immunity cannot be conferred simply because the State is laying the tax on the use of federal property in private hands, . . even if the private entity is using the Government property to provide the United States with goods . . . or services." *United States v. New Mexico*, 455 U.S. 720, 734 (1982). (Citations omitted)

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[1]United States Constitution, article VI § 2.

The controlling case with respect to discriminatory state use taxes is *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). In that case, Phillips Chemical Company leased industrial realty from the United States, and was taxed by the Dumas Independent School District according to that district's usual ad valorem tax procedures. This tax was assessed under the authority of a Texas statute which enabled the State and its political subdivisions to tax private users of federal realty. Although the subject of the tax was the right to use the property, the leasehold, the measure used was the value of the fee. 361 U.S. at 379.

By contrast, users of state owned property were taxed under a different statute. As construed by the Texas courts, this tax was less burdensome than the one imposed on users of federal property in three ways. First, the tax was measured by the value of the leasehold, not the value of the fee. Next, no tax was imposed on a lessee whose lease was for less than three years. Finally, a lease for longer than three years would not be considered taxable as such under the statute if the lease was subject to termination at the lessor's option in the event of a sale, as was Phillips' lease from the United States. Since Phillips' lease was so subject to termination, it would have paid no taxes under this section had it leased the property from the State rather than the United States. 361 U.S. at 382.

The Court held that the tax unconstitutionally discriminated against lessees of federal property. There was no question tha the Texas tax imposed a heavier burden on lessees of federal property than lessees of State property. In relieving Phillips of the tax, the Court noted that "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." 361 U.S. at 385.

In analyzing the tax at issue, the Court noted that an allegedly discriminatory tax could not be analyzed in a vacuum. "[I]t is necessary to determine how other taxpayers similarly situated are treated," and "[s]uch a determination requires 'an examination of the entire tax structure of the state' ". 361 U.S. at 383 (citations omitted.) Significantly, the Court did not hold that facial discrimination alone rendered the statute unconstitutional. "The discrimination against the United States and its lessees seems apparent. The question, however, is whether it can be justified." 361 U.S. at 382. Resolution of this case depends on the meaning of "justified" as used by the Court in *Phillips*.

In this case, all users of property are taxed alike, with the exception of those who use the property of the Virginia Port Authority and local transportation districts, both of which are subdivisions of the government of the Commonwealth.[2] As in *Phillips*, then, the discrimination against the federal government in favor of subdivisions of the state government is obvious, even though it may not extend to all state owned lands as in *Phillips*. The district court thought that the favorable treatment given to the Virginia Port Authority and the local transportation districts was justified because the affected state instrumentalities are involved in areas of "vital concern" to the federal government as well as the state government. As to the Port Authority, the district court noted that, with the exception of intrastate commerce, the federal government has jurisdiction over and regulates virtually every aspect of shipping, and that the Port Authority is "specifically empowered to cooperate with the United States and its instrumentalities in the maintenance, development, improvement and use of harbors and seaports of the Commonwealth."

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[2]The Port Authority is an agency of the Commonwealth, and local transportation districts are political subdivisions thereof.

With respect to the exception for local transportation districts, the district court found that the federal government had indicated "concern and involvement in mass transportation" through the enactment of the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq. This act declares the Congressional purpose is

> (1) to assist in the development of improved mass transportation. . . (2) to encourage the planning and establishment of area wide urban mass transportation systems. . . and (3) to provide assistance to State and local governments and their instrumentalities in financing such systems. . . .

49 U.S.C. § 1601(b) (1986) The district court also found that one of the Virginia General Assembly's purposes in creating local transportation districts was the economical utilization of public funds. The district court concluded that it was "apparent that the federal government has concerns and involvement which are similar to and furthered by the exemption of the Virginia Port Authority and local transportation districts and that federal tax monies in both areas are spared because of the exemptions." Therefore, because the United States benefits as well as the Commonwealth from the promotion and support of these state agencies, the district court held that the exemptions were justified.

The district court relied on a somewhat similar case from the Sixth Circuit, *Chrysler Corporation v. Township of Sterling*, 410 F.2d 62 (6th Cir. 1969). In *Sterling*, the court examined a Michigan use tax which exempted, inter alia, "property of any state-supported educational institution." The Supreme Court of Michigan had given a restrictive interpretation of this phrase so that it encompassed only institutions without separate taxing power, amounting to thirteen schools, but which included the University of Michigan, Michigan State University, and Wayne State University, for example.

The Sixth Circuit found that the State of Michigan had no intent to discriminate against the United States in favor state-supported educational institutions, but only intended to benefit those institutions.[3] Although lessees of federal property were not treated as favorably as lessees of exempt state schoc' property, the court held that this discrimination was justified because it was "founded upon the well-recognized policy of both the United States and the State of Michigan to protect, promote and support education, including colleges and universities." 410 F.2d at 70. The court stressed the high levels of federal funding received by the exempt institutions, concluding that "[t]he involvement of the United States along with the States with direct financing of institutions of higher learning completely dispels the contention that the exemption . . . constitutes an unjustified discrimination against the United States and its lessees." 410 F.2d at 70. Therefore, the tax assessment was upheld.[4] Chief Judge Weick dissented, finding no authority for allowing any justification of discrimination against the United States and its lessees.

With respect, we agree with the result advocated by the dissent and do not follow the analysis followed by the majority in *Sterling* and of the district court here. Implicit in that analysis is that *Phillips* articulated a two-part test for determining the constitutionality of allegedly

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[3]The primary benefits were identified as encouragement of gifts and bequests to the endowments of state-supported schools, and the tax treatment of the University of Michigan as grantee, for example, of an airport from the United States. 410 F.2d at 69.

[4]The court also found that the discrimination was minimal, and thus not rising to constitutional dimension, because the amount of affected property of state-supported educational institutions was "infinitesimal by comparison" to the total taxable realty in the State. 410 F.2d at 70. We doubt for the proposition that tax discrimination against the United States may be permissible depending on the quantum of the discrimination.

discriminatory state taxes in this area: (1) whether the users of federal property are treated less favorably than similarly situated users of state property, and (2) if so, whether such discrimination is justified in light of the state and federal interests involved. We think this misconceives the Court's decision in *Phillips*.[5] Although *Phillips* does contain language concerning justification of discriminatory taxes as a matter of rationality in an equal protection context, it appears to us that what the Court meant by justification was a showing that the two classes of users, from federal and state sources, are not similarly situated, so that in essence there is no discrimination. The Court made this clear when it stated that "[t]he imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt [state] public property must be justified by *significant differences between the two classes*." 361 U.S. at 383 (emphasis added). In other words, justification, as used in *Phillips*, relates to whether the user of federal property is similarly situated to a user of state exempt property, not whether discrimination between otherwise similarly situated users can be justified on grounds of general public policy, be it state or national.[6]

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[5]We also do not agree with *Sterling* regarding the significance of a finding that the state legislature's purpose was not to discriminate against the United States and its lessees, rather only to benefit the exempt instrumentalities. First, we must question whether a State with such a taxing scheme can truly be said not to intend any discrimination against the United States, in light of the maxim that every man is considered to intend the natural and probable consequences of his acts, which is yet in vogue in civil cases. Furthermore, even if such a lack of discriminatory intent be found, we doubt its relevance, since the United States would still receive the unfavorable tax treatment about which it complains. To follow that logic would allow the States to exempt their leasing operations on the ground that they merely sought to further their own laudable public purposes, not to burden the federal government.

[6]See also *United States v. County of Fresno*, 429 U.S. 452, 462 (1977) " . . . the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." (Footnote omitted)

Here, the Commonwealth treats those who lease from its governmental instumentalities better than it treats those who lease from the United States. If IBM used the property of the Virginia Port Authority, for example, to perform the very same contracts, no tax would have been assessed. We do not think that *Phillips* can be read as allowing such a discriminatory tax to be justified on the ground that general federal and state public interests are served by the discrimination. If federal aid to state agencies operated as an implied consent to discriminatory taxation,[7] there would be a myriad of areas a State could exempt from taxes which the federal government would have to pay. Even as a practical matter, the level and breadth of federal aid to the States is simply too great to engage in this kind of analysis, which, if carried to its logical conclusion, could result in the crippling of the tax immunity doctrine for those who deal with the federal government. Most importantly, the proper inquiry is not whether the federal courts conceive that federal interests are advanced by the discriminatory exemption, but whether the United States may be forced to acquiesce in the State's judgment that these interests are so served.

In sum, we are of opinion that Virginia Code § 58.1-3502 does not tax those who lease from the Virginia Port Authority and transportation districts the same as those who lease from the United States. This much is apparent. We are further of opinion that such discriminatory taxation against those who deal with the United States is not justified within the decision in *Phillips* . . There is no indication that if two people, each leased identical tangible personal property for the same purpose, one lot of which was owned by the Virginia Port Authority, the other lot being owned by the United States, that the discriminatory tax would be enforced. There is no distinction made in this record

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[7]See also *Chrylser Corporation v. Township of Sterling*, 410 F.2d 62, 78 (6th Cir. 1969) (Chief Judge Weick dissenting).

between lessees from the state and national governments, and none is offered by the Commonwealth. Thus, the discriminatory taxation as applied to IBM is not justified under *Phillips*.

The judgment of the district court is vacated and the case remanded for action not inconsistent with this opinion.

VACATED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants.

Civil Action

No. 85-0731-A

and

WILLIAM H. FORST
State Tax Commission of the
Commonwealth of Virginia
Defendant-Intervenor.

ORDER

This matter has been submitted to the Court upon the briefs of the parties, a joint stipulation of facts and argument of counsel at a hearing on ther merits held December 13, 1985.

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that summary judgment is GRANTED in favor of the defendants and the plaintiff's action is DISMISSED.

DATED: Jan 30, 1986 /s/ Claude M. Hilton

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas,
Defendants.

Civil Action

No. 85-0731-A

and

WILLIAM H. FORST
State Tax Commission of the
Commonwealth of Virginia
Defendant-Intervenor.

MEMORANDUM OPINION

This action was instituted by the United States for the purpose of obtaining (1) a declaratory judgment that Code of Va. § 58-831.2 unconstitutionally discriminates against the United States by permitting taxation of property furnished by the United States to its contractors but not subjecting to tax the use of property furnished by the State to certain contractors or property leased by local transportation districts; (2) preliminary and permanent injunctions preventing the defendants and those acting in concert with them from imposing, assessing or collecting taxes pursuant to Va. Code Ann. § 58-831.2 on property owned by the United States and furnished to its contractors; and (3) for a refund of taxes paid to the City of Manassas from 1981 to 1984 by International Business Machines Corporation ("IBM") pursuant to Va. Code Ann. § 58.831.2.

IBM Federal Systems Division, which is located in the City of Manassas, has a number of contracts with the Department of Defense and administered by the Defense Logistics Agency, including approximately twenty-nine contracts involved in this case which are primarily contracts let by the Navy for advanced signal processing and submarine sonar work. Some of the contracts are for research and development and others are production contracts which involve manufacturing and testing of equipment. IBM receives a fee in addition to reimbursement of its costs for the performance of these contracts. The contract fees are a profit for IBM.

Under the contacts, the United States through the Defense Logistics Agency has provided Government—owned property to IBM. The provisions of the contracts and federal regulations allow this property to be used only in the performance of Government contracts.

On June 23, 1981, the City of Manassas informed IBM by letter that by Code of Virginia § 58-831.2, IBM was subject to local taxation and that under Virginia law manufacturers are subject to local taxation on machinery and tools used in manufacturing such as the machinery and tools furnished to IBM by the Federal Government for the performance of the contracts at the Manassas facility . At the direction of the Defense Logistics Agency, IBM has paid the City of Manassas under protest the taxes assessed pursuant to Code of Va. § 58-831.2 for the tax years 1981 through 1984. The amounts of the taxes that have been paid are as follows:

Tax Year	**Amount Paid**
1981	$69,179
1982	71,397
1983	73,318
1984	76,471
Total	$290,364

The contracts between IBM and the Department of Defense are cost-plus fee contracts which taxes such as the taxes imposed pursuant to Code of Va. § 58-831.2 by the defendants are reimbursable costs. IBM has been reimbursed by the United States for the tax payments listed above. The United States is therefore the real party in interest. William H. Forst, State Tax Commissioner of Virginia has been permitted to intervene in this action pursuant to F.R.C.P. 24(b)(2) in order to defend the statute in issue.

The taxes imposed pursuant to Va. Code Ann. § 58-831.2, by the defendant, the City of Manassas, on the use of Government property furnished to IBM were assessed at the original cost of the property less depreciation.

This case is presently before the Court upon the briefs of the parties and a joint stipulation of facts. Based on the stipulation of facts and arguments presented at a hearing on December 13, 1985, I find that the material facts are not in dispute and summary judgment is appropriate under F.R.C.P. 56.

The statute under consideration, Code of Va. § 58-831.2, states as follows:

> Any person, firm, association, unincorporated company, or corporation engaged in business for profit who are which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent, in the same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964.

This statute has since been recodified, without amendment of its provisions, at § 58.1-3502.

The Virginia Port Authority is an agency of the Commonwealth of Virginia established by Code of Va. §62.1-128 *et. seq.* Local transportation districts are political subdivisions of the Commonwealth of Virginia created by § 15.1-1342 *et seq.* The parties are in agreement that the City of Manassas is not a member of a local tranportation district commission, and that the Virginia Port Authority does not exercise its authority in the City of Manassas in that there are no water terminals, port facilities or other such authority property local within the geographical boundaries of the City of Manassas.

The defendants contend that because there are no Virginia Port Authority contractors or local transportation district contractors within the boundaries of the City of Manassas, the statute it not unconstitutional because it has not been discriminatorily applied. However, the proper examination of the statute is an examination of its language and its affect in the State and not its application in a particular local jurisdiction. *Phillips Chemical Co.*, 361 U.S. 376 (1960) requires a determination of how other taxpayers similarly situated are treated and that determination requires an examination of the whole tax structure of the state.

The United States' first argument is that § 58-831.2 is unconstitutional on its face in that it authorizes the imposition of local personal property taxes on property furnished to contractors of the Federal Government but does not apply to property furnished to contractors of the Virginia Port Authority or local transportation districts.

A state tax may not discriminate against the Federal Government or those with whom it deals. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *Phillips Chemical Co., supra*, the Supreme Court ruled on a Texas statute which authorized the taxation of the full value of property leased by a

Federal Government contractor, but not contractors with similar leases, using tax exempt property owned by the state and its political subdivisions. The court held that while a statute is seemingly discriminatory against the United States, the inquiry must go further to determine whether the statute is discriminatory in its application or the discrimination can be justified. The State of Texas argued that the state could collect in rent what it loses in taxes from its own lessees and could not from the United States government. It also argued that the state may legitimately foster its own interests by adopting measures which facilitate the leasing of its property, and that federal leasing of exempt land has a more serious impact on the fincances and operations of local government than do the states own leasing activities. The court held that none of these arguments were adequate to justify what appears to be so substantially and transparent a discrimination against the government.

As seen in *Phillips*, although a statute is seemingly discriminatory on its face, it will not be unconstitutional if the discrimination is justified. Likewise, the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the state. *United States v. County of Fresno*, 429 U.S. 452 (1977). In *Washington v. United States*, 460 U.S. 536 (1983) the Supreme Court affirmed its holding in *Phillips* in rejecting the argument that a tax is invalid simply because it treats those who deal with the Federal Government differently than it treats others, and again stated that the discrimination whether a tax is discriminatory requires an examination of the whole tax structure of the state.

In the present case, § 58-831.2 of the Code of Virginia carves out two classes of exempt property: the Virginia Port Authority and local transportation districts. Both areas are of vital concern to the Federal Government as well as the state. With the exception of intrastate commerce, the Federal

Government has jurisdiction over and regulates virtually every aspect of shipping. The Virginia Port Authority was established by the General Assembly to foster and stimulate the commerce of the ports of the Commonwealth (*See* Joint Stipulation No. 16). Among other things, the Authority is granted police powers regarding matters affecting the safety and security of Authority property. Code of Va. § 62.1-131.11. And the Authority is specifically empowered to cooperate with the United States and its instrumentalities in the maintenance, development, improvement and use of harbors and seaports of the Commonwealth § 62.1-132.13.

Similarly, the federal government indicated its concern and involvement in mass transportation by the enactment of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et. seq.*, which declares Congressional policies designed:

> (1) to assist the development of improved mass transportation . . . (2) to encourage the planning and establishment of area wide urban mass transportation systems . . . (3) to provide assistance to State and local governments and their instrumentalities in financing such systems . . . 49 U.S.C. § 160 (b)

Likewise, the General Assembly's purpose in establishing local transportation districts was to promote the orderly growth and development of the urban areas of the Commonwealth for the safety of its citizens and for the economic utilization of public funds (Joint Stipulation No. 20). The exemption of transportation district property further promotes both the Federal and State purposes by removing the additional expense accompanying the acquisition of equipment necessary to facilitate the above mentioned objectives.

It becomes apparent that the federal government has concerns and involvement which are similar to and furthered by the exemption of the Virginia Port Authority and local transportation districts and that federal tax monies in both areas are spared because of the exemptions.

A similar case was presented in *Chrysler Corporation v. Township of Sterling,* 410 F.2d 62 (6th Cir. 1969) where a Michigan use tax was attacked. The statute, referred to as Act 189, provided as follows:

> When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park market, fairground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user was the owner of such property. Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

The *Chrylser* case arose out of the assessment by the Township of Sterling of an annual tax on Chrysler's use and occupancy of a U.S. Government-owned plant. Chrysler occupied and used part of the plant for manufacture of weapons for the Department of the Army.

The Sixth Circuit examined, *inter alia,* the statutory exemption for property of state-supported educational institutions and found it to be "reasonable and valid because it is founded upon the well recognized policy of both the United States and the State of Michigan to protect, promote and support education, including colleges and universities. The involvement of the United States along with the States with direct financing of institutions of higher learning completely dispels the contention that the exemption of Michigan state-supported universities and colleges under Act 189 constitutes an unjustifiable discrimination against the United States and its lessees." 410 F.2d at 70.

Likewise, the United States benefits as well as the State from the promotion and support of Virginia Port Authority and transportation districts. Many federal dollars are spent in both areas and the exemption under the Virginia statute should provide some financial benefits to the United States. Other than two narrow exceptions, which benefit both the Federal and State governments, both Federal and State government contractors are treated the same. That is, property of either government in the hands of a contractor is taxed at the same rate.

Accordingly, the exemptions contained in § 58-831.2 for the Virginia Port Authority and local transportation districts do not discriminate against the United States but creates justified exemptions which benefit both the State and Federal Governments.

The other Constitutional attack on § 58-831.2 by the United States is that the statute fails to tax the interest of the contractor in the government property and thus is in reality a tax on the United States. In particular, in imposing the tax authorized, the City of Manassas assessed IBM's machinery and tools at their original cots, less depreciation. As the United States is the owner of the property, assessing the full value of the property to IBM, which does not have a full ownership interest, it is argued, necessarily results in the taxation of a portion of the interest of the United States in the property. Taxation of the property of the United States is unconstitutional.

§ 58-831.2 states in pertinent part that government contractors:

> shall be liable to local taxation . . . to the same extent, in the same manner, and on the same basis as if the lessee were the owner thereof.

Code of Va. § 58-831 requires that machinery and tools segregated for local taxation "shall be valued by means of depreciated cost . . . "

The U.S. Supreme Court has already ruled however, that a use tax, as opposed to a property tax, may be based on the full value of the property used. In *United States v. Boyd,* 378 U.S. 39 (1964) a use tax was imposed upon profit-making contractors of the United States and measured by the purchase price or fair market value of the property so used, whichever was greater. The Court upheld the Constitutionality of this tax, even though it was measured by the value of the government-owned property.

Similarly, in *United States v. City of Detroit,* 355 U.S. 466 (1958), a Michigan statute made the lessees of government property "subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property . . . " p. 468, n. 1. Alike its argument in the instant case, the United States argued in *Detroit* that because the tax was measured by the value of the property, it should be treated as a tax on the property. The Supreme Court was not persuaded and stated:

> A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. (citations omitted.) In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used . . . In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used. *Detroit* at 470.

Like the Michigan tax in *Detroit*, the tax in issue here is imposed upon IBM's use of the government-owned machinery and tools; not upon the property itself. The measurement of such tax by its original cost less depreciation is, therefore, a fair and permissible method of valuation.

Accordingly, an appropriate order will enter denying plaintiff's requested relief and entering judgment for the defendants.

DATED: Jan 30, 1986 /s/ Claude M. Hilton

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2544

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for The City of Manassas,

Defendants-Appellees,

and

WILLIAM H. FORST
State Tax Commissioner of the
Commonwealth of Virginia

Intervenor-Appellee.

NOTICE OF APPEAL

COME NOW the Appellees, City of Manassas, Virginia, Arthur L. Shoemake, and William H. Forst, by counsel, pursuant to Rule 10 of the Rules of the United States Supreme Court, and hereby notice their appeal from the October 6, 1987 decision of this Court vacating the January 30, 1986 Order of the United States District Court for the Eastern District of Virginia, Alexandria Division. This appeal is taken by the above-references parties pursuant to 28 U.S.C. § 1254 (2).

Respectfully submitted,

CITY OF MANASSAS, VIRGINIA,
ARTHUR L. SHOEMAKE, and
WILLIAM H. FORST

By /s/ James W. Hopper
Of Counsel

James W. Hopper, Esq.
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Honorable Mary Sue Terry
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Senior Assistant Attorney General
Marion S. Cooper, Esq.
Assistant Attorney General
101 N. Eighth Street

Richmond, Virginia 23219
(804) 786-6554

PROOF OF SERVICE

I hereby certify that this Notice of Appeal was mailed, postage prepaid, pursuant to Rule 10 of the Rules of the United States Supreme Court this 23rd day of December, 1987, to the Honorable Charles Fried, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and Honorable Edwin R. Meese, c/o Michael L. Paup, Esq. and Richard A. Correa, Esq., Attorneys, Tax Division, Department of Justice, P.O. Box 502, Washington, D.C. 20044. All parties required to be served have been served. (Rule 28.5 of the Rules of the United States Supreme Court.

/s/ James W. Hopper

James W. Hopper

Filed: December 23, 1987

APPENDIX D

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951, ch 655, § 48, 65 Stat. 726; July 7 1958, P.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P.L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch 646, § 1, Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P.L. 96-486, § 2(a), 94 Stat. 2369.)

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by an agency or officer therof expressly authorized to sue by Act of Congress.

(June 25, 1948, c. 646, § 1, 62 Stat. 933.)

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, § 1, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, P.L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, P.L. 94-455, Title XIII, § 1306(b) (8), 90 Stat. 1719.)

§ 58.1-3502. Tangible personal property leased, loaned, or otherwise made available to a private party from agency of federal, state or local government. — Any person, firm; association, unincorporated company, or corporation engaged in business for profit who or which leases, borrows or otherwise has made available to it any tangible personal property to be used in such business from any agency or political subdivision of the federal, state or local governments shall be liable to local taxation, unless otherwise exempted or partially exempted by state or local laws, to the same extent in the same manner, and on the same basis as if the lessee were the owner thereof. This section shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to property owned by any transportation district organized under the Transportation District Act of 1964 (§ 15.1-1342 et seq.) and leased to provide transportation services. (Code 1950, § 58-831.2; 1960, c. 239; 1975, c. 504; 1980, c. 1981, c. 442; 1984, c. 675.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants.

and

WILLIAM H. FORST
State Tax Commissioner of the
Commonwealth of Virginia
Applicant for Intervention.

MOTION TO INTERVENE AS A DEFENDANT UNDER FEDERAL RULES OF CIVIL PROCEDURE RULE 24(b) (2)

William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, moves for leave to intervene as a defendant in his official capacity in this action for the purpose of defending the Virginia tax statute in issue and thereby to assert the defenses set forth in his proposed Answer, a copy of which is hereto attached. The State Tax Commissioner recognizes that there is no liability on the part of the Commonwealth of Virginia inasmuch as the tax revenue derived from the operation of said statute inured solely to the benefit of the City of Manassas. The State Tax Commissioner asserts, however, that the is entitled to intervene under Fed. R. Civ. P. 24(b) (2) on the grounds (1) that whenever deemed advisable, he has a public duty to intervene in any action wherein the constitutionality of a State revenue statute is in

question and 2) that he has a duty to assist in the administration of the statute in issue. The State Tax Commissioner further asserts that he has defenses to Plaintiff's claim presenting wuestions of both law and fact which are common to the main action. Finally, the State Tax Commissioner asserts that his intevention will not unduly delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, your Applicant, William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, respectfully prays that this Honorable Court allow him to intervene in this action for the reasons set forth in this motion as as are more fully set forth in the accompanying memorandum of authorities.

Respectfully submitted,

WILLIAM H. FORST
STATE COMMISSIONER OF THE
COMMONWEALTH OF VIRGINIA

By /s/ Marion S. Cooper
Counsel

Willliam G. Broaddus
Attorney General of Virginia

Kenneth W. Thorson
Senior Assistant Attorney General

Marion S. Cooper
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0061

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion to Intervene was mailed, postage prepaid, to James W. Hopper, Attorney for the City of Manassas, *et al.* at P.O. Box 1201, Richmond, Virgina 23209; Elsie L. Munsell (Joseph A. Fisher, III, Assistant U.S. Attorney), United States Attorney for the Eastern District of Virginia, 701 Prince Street, Alexandria, Virginia 22314; and Glen L. Archer, Jr., Edward J. Snyder, and Richard A. Correa, Attorneys, Tax Division, United States Department of Justice, Washington, D.C. 20530; Attorneys for the United States of America this 13th day of August, 1985.

/s/ Marion S. Cooper
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants. No. 85-0731-A

and

WILLIAM H. FORST
State Tax Commission of the
Commonwealth of Virginia
Applicant for Intervention.

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

In support of his Motion to Intervene, your Applicant, William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, offers the following Memorandum of Authorities:

STATEMENT OF THE CASE

(1) The United States brought suit in the Eastern District of Virginia against the City of Manassas and Arthur L. Shoemake, Commissioner of Revenue for the City of Manassas, to have Va. Code § 58-831.2 (now recodified as § 58.1-3502) declared unconstitutional, to enjoin preliminarily and permanently the defendants from enforcing the statute, and for a refund of taxes totaling $290,364 plus interest paid to City of Manassas by International Business Machines (as a

contractor for the United States) for which the United States reimbursed International Business Machines.

(2) The State Tax Commissioner now seeks to intervene in this action to defend Va. Code § 58-831.2 pursuant to Fed. R. Civ. P. 24(b) (2).

GROUNDS FOR INTERVENTION

The constitutionality of Va. Code § 58-831.2 has been questioned. The State Tax Commissioner contends upon the law and facts that such statute is not unconstitutional. In support of his argument, the State Tax Commissioner will set out a full development of the law and facts surrounding the statute in question. Thus, the requirement of Fed. R. Civ. P. Rule 24(b) (20 that there be common questions of law and fact between the main action and the defense of the intervener is met by the State Tax Commissioner.

Furthermore, the court may permit an applicant to intervene under Fed. R. Civ. P. 24(b) (2) if such applicant is charged with a public duty to do so. *See Jewell Ridge Coal Corp. v. Local No. 6167,* 3 F.R.D. 251, 254 (W.D. Va. 1983) (noting that an applicant charged with a public duty which reasonably required him to intervene in a pending case may be permitted to intervene even though the applicant has no direct personal or pecuniary interest in the subject of the litigation). The State Tax Commissioner has a public duty ot intervene. Va. Code § 58-33(5) (now recodified as § 58.1-202(9) provides that the State Tax Commissioner shall:

> "Intervene, by petition or otherwise, whenever deemed advisable in any action or proceeding pending in any court wherein the constitutionality or construction of any State tax or revenue statute or the validity of any State Tax is in question; and the court wherein such action or proceeding is pending may, by order entered therein, make the Commissioner a party thereto whenever deemded necessary."

Thus, the Applicant is charged with the public duty necessary to permit his intervention.

Additionally, Fed. R. Civ. P. 24(b) (2) provides that:

> "When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action."

Va. Code § 58-33(2a) prescribes that the State Tax Commissioner shall "[p]rovide commissioners of the revenue with information and assistance in the assessment of personal property." Furthermore, § 58-857 (now recodified as § 58.1-3105) provides that the "State Tax Commissioner shall . . . give instructions to the commissioners of the revenue in respect to their duties . . . " Accordingly, the State Tax Commissioner is responsible for assisting in the administration of the statute is issue inasmuch as such statute subjects tangible personal property to local use taxation.

For intervention to be allowed under Fed. R. Civ. P. 24(b) (2) it must not unduly delay or prejudice the adjudication of the rights of the original parties. At this early stage in the proceeding where there has been no discovery, it does not appear that delay or prejudice will result if intervention is allowed. *See Alexander v. Hall,* 64 F.R.D. 152, 157 (D.S.C. 1974).

WHEREFORE, the Applicant, William H. Forst, the State Tax Commissioner of the Commonwealth of Virginia, respectfully prays that this Honorable Court allow his

intervention in this case as a party defendant pursuant to Fed. R. Civ. P. Rule 24(b)(2) on the issue of whether Va. Code § 58-831.2 is unconstitutional.

Respectfully submitted,

WILLIAM H. FORST,
STATE TAX COMMISSIONER OF THE
COMMONWEALTH OF VIRGINIA

By: /s/ Marion S. Cooper
Counsel

William G. Broaddus
Attorney General of Virginia

Kenneth W. Thorson
Senior Assistant Attorney General

Marion S. Cooper
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0061

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum of Authorities in support of Motion to Intervene was mailed, postage prepaid, to James W. Hopper, Attorney for the City of Manassas, *et al.* at P.O. Box 1201, Richmond, Virgina 23209; Elsie L. Munsell (Joseph A. Fisher, III, Assistant U.S. Attorney), United States Attorney for the Eastern District of Virginia, 701 Prince Street, Alexandria, Virginia 22314; and Glen L. Archer, Jr., Edward J. Snyder, and Richard A. Correa, Attorneys, Tax Division, United States Department of Justice, Washington, D.C. 20530; Attorneys for the United States of America this 13th day of August, 1985.

/s/ Marion S. Cooper
Assistant Attorney General

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
ARTHUR L. SHOEMAKE,
Commissioner of Revenue for
The City of Manassas.
Defendants.

FILED
SEP 22 1985
Clerk, U.S. District Court
Alexandria, Virginia

and

WILLIAM H. FORST
State Tax Commissioner of the
Commonwealth of Virginia
Applicant for Intervention.

ORDER

UPON CONSIDERATION of the formal papers filed by William H. Forst, State Tax Commissioner for the Commonwealth of Virginia, as an Applicant for Intervention in this action and

IT APPEARING to the Court that the Applicant is entitled to intervene in this action,

IT IS ORDERED that said Applicant be permitted to intervene in this action pursuant to Fed. Rule Civ. P. 24(b) (20 in order to defend the statute in issue.

ENTER:

/s/ G. R. B.

Judge

9/23/85

I ask for this:

/s/ Marion S. Cooper

Marion S. Cooper
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Seen and agreed:

/s/ James W. Hopper

James W. Hopper
Attorney for Defendants

/s/ Richard A. Correa

Richard A. Correa
Attorney for Plaintiff

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Civil Action No. 85-0731-A

CITY OF MANASSAS, VIRGINIA
et al.,

Defendants.

and

WILLIAM H. FORST,
State Tax Commissioner of the
Commonwealth of Virginia
Defendant-Intervenor

NOTICE OF APPEAL

Notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Fourth Circuit from the January 30, 1986 judgment of the United States District Court for the Eastern District of Virginia.

Dated March 28, 1986.

JUSTIN W. WILLIAMS
United States Attorney

By: /s/ Joseph A. Fisher, III
Assistant United States Attorney

/s/ Richard A. Correa
RICHARD A. CORREA
Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6555

Attorneys for the Plaintiff,
the United States of America

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 28th day of March, 1986 to each of the following:

Honorable Marion S. Cooper
Assistant Attorney General
Commonwealth of Virginia
101 N. 8th Street
Richmond, VA 23219

and

James W. Hopper, Esq.
Gardner, Moss & Rocovich
P.O. Box 1201
Richmond, VA 23209.

/s/ Joseph A. Fisher, III

Joseph A. Fisher III
Assistant United States Attorney
701 Prince Street
Alexandria, VA 22314
Telephone: 703/557-9100